

CANADA / JUDGMENT

Oxford Holdings Ltd. v. Peoples Trust Co.

2002 BCSC 957

COURT

Supreme Court of British Columbia

DECIDED

27 June 2002

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Citation: Oxford Holdings Limited v. Peoples Trust Company

Date: 20020627
2002 BCSC 957

Docket: C994890
Registry: VANCOUVER
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: OXFORD HOLDINGS LIMITED
PLAINTIFF

AND: PEOPLES TRUST COMPANY
DEFENDANT

AND: WEBSTER HUDSON & AKERLY
THIRD PARTY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE KOENIGSBERG

Counsel for the Plaintiff:

Larry Smeets

Counsel for the Defendant:

Shayne P. Strukoff

Counsel for the Third Party:

Patrice M.E. Abrioux

Date and Place of Trial:

February 11-13, & 15, 2002

Vancouver, BC

FACTUAL BACKGROUND

- [1] The plaintiff, Oxford Holdings Limited ("Oxford") is a British Columbia company.
- [2] The defendant, Peoples Trust Company ("Peoples") is a financial institution that lent money to Oxford, secured by a mortgage against property owned by the company.
- [3] The third party Webster Hudson & Akerly is the law firm that acted for Peoples with respect to the loan. The particular solicitor was Graham A. Porteous. Those third party proceedings have been adjourned.
- [4] Oxford is the major asset of the estate of John Wilfred Oughton, who passed away on June 26, 1985. The company owns a duplex at 5336 and 5338 Cambie Street, Vancouver, B.C. (the "property").
- [5] The will of Mr. Oughton appointed Ione Oughton (his wife) and his two sons Michael Marc Oughton ("M. Oughton") and John Horace Oughton ("J. Oughton") as executors, and left a life estate over the estate assets to Ione Oughton, with the residue to be divided equally between the two sons upon her death.
- [6] Ms. Nita Ruzicka ("Ms. Ruzicka"), the aunt of J. Oughton and M. Oughton, and the executor named in the will of Ione Oughton, is acting as the current director and president of Oxford. Ms. Ruzicka is a former accountant and tax auditor.
- [7] In or about September 1985, J. Oughton was convicted of being a serial rapist, and has been indefinitely incarcerated at Kent Penitentiary.
- [8] By Grant of Probate dated January 20, 1986, Ione Oughton and M. Oughton became executors of the estate.
- [9] In February 1986, the deceased's shares in Oxford were transferred into the names of Ione Oughton and M. Oughton as executors of the estate, as recorded in the Register of Members. M. Oughton remained a registered shareholder throughout 1998.
- [10] By "double probate" - meaning that there was a second probate granted for the estate - J. Oughton also became an executor of the estate on March 4, 1991. However, he did not take any steps to have the shares in Oxford registered in his name as executor.
- [11] By resolution dated April 1997, M. Oughton was elected as a director to hold office "until the next Annual General Meeting". This differed from the resolutions passed in prior years, which limited the appointment to the ensuing year only. M. Oughton did not sign this resolution. However, in my view that is irrelevant to the issues before the court.

- [12] M. Oughton resigned as secretary and director of Oxford on June 13, 1997, and assigned himself into bankruptcy on December 31, 1997.
- [13] Before April 1998, Ione Oughton, Ms. Ruzicka and J. Oughton had concerns about M. Oughton's conduct in relation to Oxford's assets. In or about April 1998, Ione Oughton met with Mr. Lopston, Oxford's corporate solicitor, to have the corporate records updated in Victoria, B.C. to show that M. Oughton no longer held any position with the company. In this regard, by letter dated April 7, 1998, Mr. Lopston forwarded the necessary resolutions and Annual Report to Ione Oughton for execution. Ms. Ruzicka was also aware that such documents were going to be prepared, since she attended Mr. Lopston's office along with her sister. However, due to the unfortunate death of Ione Oughton on May 10, 1998, the resolutions and corporate notices were not executed at that time.
- [14] On May 21, 1998, Ms. Ruzicka contacted Mr. Lopston's office regarding the 1998 Annual Report and proxies. Ms. Ruzicka was aware that Mr. Lopston was the solicitor who could attend to the appropriate filings in Victoria, B.C. However, at trial, she could not provide any explanation as to why the necessary report was not filed with the Corporate Registry in Victoria during 1998.
- [15] In the summer of 1998, Ms. Ruzicka and J. Oughton became aware that M. Oughton was holding himself out as Oxford's representative in order to gain access to the company's assets. In particular, Ms. Ruzicka personally overheard M. Oughton making such representation to a teller at a branch of the Toronto Dominion Bank ("TD Bank") where Oxford banked. She was also aware that M. Oughton was attempting to obtain a loan on behalf of Oxford. She advised J. Oughton of this at the time. Both were concerned that M. Oughton may attempt to encumber the corporate assets for personal gain which, to their knowledge, he had done before. Ms. Ruzicka also told Mr. Lopston, the solicitor, that he should get in touch with J. Oughton at the prison.
- [16] On August 10, 1998, J. Oughton dictated a letter to the TD Bank, which was typed by Ms. Ruzicka. The letter specifically expressed that M. Oughton "be prevented from mortgaging or otherwise encumbering any assets of Oxford Holding Limited and in particular, the property known as 5336-5338 Cambie Street in the City of Vancouver, B.C." The letter was also copied to Mr. Lopston and Oxford's accountant.
- [17] Ms. Ruzicka was also aware that they could protect the company's real estate by filing a caveat against title in the Land Title Office. Indeed, shortly after the incident involving M. Oughton at the TD Bank (August 1998), Ms. Ruzicka instructed Robert Burns, a solicitor, to file a caveat. However, Ms. Ruzicka stated that, for reasons that are not entirely clear, Mr. Burns did not attend to this during the summer of 1998. Apparently neither she nor J. Oughton followed up with Mr. Burns during the relevant period of time. In fact, no attempt was made to file a caveat until a couple of weeks after the mortgage in favour of Peoples had already been registered.

- [18] On September 10, 1998, a further letter was sent to the TD Bank.
- [19] However, other than sending letters to the TD Bank in August and September 1998, it appears that neither J. Oughton nor Ms. Ruzicka took any steps to update the corporate filings at Victoria, B.C. to reflect that M. Oughton had no corporate capacity. Those records were not updated until 1999, after the events in question. Nor, during the relevant period of time, did J. Oughton or Ms. Ruzicka alert financial institutions other than the TD Bank, or register any caveat against Oxford's property to show that J. Oughton had a direct or indirect interest in the property. Nor were shares in Oxford registered to J. Oughton or Ms. Ruzicka until October 2001.
- [20] On September 1, 1998, Oxford entered into a mortgage with Ms. Haffenden. The mortgage was registered in the Land Title Office on September 3, 1998. M. Oughton alone signed as the authorized signatory of Oxford. The evidence is unclear but I find that J. Oughton likely became aware of such mortgage sometime between his letter of October 13, 1998, to M. Oughton, and just prior to the "bigger mortgage" being obtained from Peoples.
- [21] In or around September 1998, M. Oughton, on behalf of Oxford, applied through a mortgage broker - Proline Mortgage Centre Inc. - to Peoples for a loan of \$250,000 (the "Loan"). In October 1998 Peoples retained Graham A. Porteous ("Mr. Porteous") of the law firm of Webster Hudson & Akerly to represent it with respect to the Loan. Both Peoples and Mr. Porteous became aware of M. Oughton's bankruptcy, and it was a condition of the Loan that M. Oughton be fully discharged from bankruptcy before advancement of funds. Mr. Porteous also understood that his role was to obtain a valid first mortgage for his client.
- [22] Since, as a result of his bankruptcy, M. Oughton was disqualified from acting as a director under the Company Act, Mr. Porteous acted to ensure that an absolute discharge was granted before proceeding with the legal work necessary for the transaction. On October 13, 1998, the Supreme Court of British Columbia granted M. Oughton such a discharge.
- [23] On October 15, 1998, Mr. Porteous obtained a BC Online Corporate search of Oxford. This search showed that the directors of Oxford were M. Oughton and Ione Oughton. Mr. Porteous was aware, through several sources, that Ione Oughton had passed away in the spring of 1998.
- [24] Mr. Porteous also conducted a Land Title search, and obtained a copy of the Haffenden mortgage. As stated, it showed that M. Oughton alone had entered into the mortgage of Oxford. This reinforced Mr. Porteous' belief that he was dealing with a one-person company. He was not aware of any purported interest or claim of J. Oughton.
- [25] Mr. Porteous prepared the standard mortgage documents and corporate resolutions. He provided them to Oxford. Prior to the execution of the mortgage, Mr. Porteous received from M. Oughton a certified copy of the resolutions of Oxford passed on October 20, 1998. The resolutions approved the terms of the loan and the mortgage, and authorized M. Oughton to execute the mortgage on behalf of Oxford.

- [26] Mr. Porteous also received a certified copy of the Officer's Certificate dated October 20, 1998. The Officer's Certificate confirmed, among other things, that M. Oughton had been "duly appointed as the sole director and the president of Oxford".
- [27] On October 20, 1998, M. Oughton executed the mortgage on behalf of Oxford. Mr. Bruce G. Livingston, a solicitor, witnessed the mortgage on behalf of the company. This, of course, amounted to a certificate of the matter set out in Part 5 of the Land Title Act, namely that M. Oughton acknowledged to Mr. Livingston that he was the authorized signatory of the corporation, that he was authorized by the corporation to execute the instrument, and that the corporation existed at the time the instrument was executed and was legally entitled to hold and dispose of land in British Columbia.
- [28] On October 30, 1998, the mortgage was registered in the Land Title Office. The defendant then advanced the funds under the mortgage. The funds were disbursed in accordance with the order to pay signed by M. Oughton on behalf of the plaintiff. A payment of \$69,532.06 was made to Deloitte & Touche, the former trustee in bankruptcy of M. Oughton, pursuant to the order to pay.
- [29] A portion of the funds was also used to discharge the prior Haffenden mortgage that had been registered against Oxford's property, and to pay property taxes owing by the company. Accordingly, the company received at least some direct benefit from the transaction.
- [30] At the time of execution of the mortgage and the advance of funds, which is the relevant period of time, Mr. Porteous stated he was not aware of any limitation on M. Oughton's authority to enter into the mortgage on behalf of Oxford. Certainly, Peoples was not made aware of any such lack of capacity.
- [31] Ms. Ruzicka became the director and president of Oxford in or about May 1999. It was only after such date that the corporate records and filings in Victoria were changed to show that M. Oughton was no longer a director. One of the purposes of updating the public record was to prevent M. Oughton from holding himself out as Oxford's representative. Such a step could have been taken back in the summer of 1998, but it was not.
- [32] There were only two public registries relevant to the transaction: the Corporate Registry in Victoria, B.C. and the Land Title Office for Vancouver. Mr. Ritson, the current solicitor for Oxford, indicated that preparing and filing the notice of directors and caveat would have been relatively simple tasks. However, neither one of those tasks was performed prior to registration of the impugned mortgage.
- [33] The parties identified the following issues to be resolved:
- (A) Did M. Oughton have actual authority to enter into the mortgage on behalf of Oxford?
- (B) In the alternative, did M. Oughton have the ostensible or apparent authority to enter into the mortgage on behalf of Oxford?

(C) If there was a defect in M. Oughton's actual appointment or authority to enter into the mortgage, can this defect be remedied by the provisions of the Company Act?

(D) In the further alternative, if there was any defect in M. Oughton's actual appointment or authority to enter into the mortgage, is Peoples, the mortgagee, nevertheless, protected by the indoor management rule?

[34] The first issue to decide, then, is whether M. Oughton had actual authority to execute the mortgage on behalf of Oxford in favour of Peoples, such that the mortgage is valid and enforceable.

Actual Authority

[35] Companies, such as Oxford, can only engage in transactions with other entities through individuals who are conferred authority to enter into obligations on the company's behalf. A person may be given actual authority or may have ostensible apparent authority to act on behalf of the company. The concept of actual authority involves a company expressly or impliedly authorizing an individual to enter into particular transactions on behalf of the company. For example, actual authority may be given to an individual by way of the terms set out in relevant legislation, articles, or corporate resolutions.

[36] In Oxford's Articles of Association ("the Articles"), the directors are given the express authority to obtain mortgages against any real property of the Company. Article 70 states:

The Directors may . . . borrow and secure the payment of any sum or sums of money for the purpose of the Company, and for that purpose may execute any mortgages . . . or execute any other form of security whatsoever of real and/or personal property of the Company or any part thereof, and sign, seal and deliver the same.

[37] On October 20, 1998, M. Oughton issued an Officer's Certificate naming himself as the president and sole director of Oxford, and passed a resolution authorizing him to enter into the mortgage transaction on behalf of Oxford. In other words, both the Articles and a corporate resolution conferred actual authority on M. Oughton, as president and director of Oxford, to secure a loan from Peoples by way of a mortgage against the duplex. Accordingly, the central question here is whether or not M. Oughton was truly a director of Oxford when the mortgage transaction was executed in October 1998.

Was M. Oughton a Director of Oxford in October 1998?

[38] Under Article 61, the one qualification of a director is that he or she hold at least one share in Oxford, and it is the duty of a director to comply with the provisions of the Company Act, R.S.B.C. 1996, c.62 ("the Company Act"). Under the Company Act, subsection 1(1) sets out that a "director includes every person, by whatever name designated, who performs the functions of a director." The only substantive requirement that must be satisfied to qualify to be a director of Oxford is to hold at least one share in Oxford - in short, to be a member or registered shareholder of Oxford.

- [39] Oxford's Register of Members, at all relevant times in the fall of 1998, listed M. Oughton as the only surviving member or registered shareholder. The Company Act defines "member" in subs. 1(1), for our purposes, to include "every other person who agrees to become a member of a company and whose name is entered in its register of members or a branch register of members." Articles 23, 24 and 25 support the view that it is necessary for persons entitled to shares to become a registered shareholder in order for them to be a voting member of Oxford, and eligible to be a director.
23. The executors or administrators of a deceased sole holder of a share shall be the only persons recognized by the Company as having any title to the shares. In the case of a share registered in the names of two or more holders, the survivor or survivors shall be the only persons recognized by the Company as having any title to the share.
24. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be required by the Directors, have the right to be registered as a member in respect of the share . . .
25. A person becoming entitled to a share by reason of the death or bankruptcy of a holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the Company.
- [40] It was not until the fall of 2001, over three years following the mortgage transaction, that J. Oughton or Nita Ruzicka exercised their entitlements under the estate and became members or registered shareholders of Oxford. As the BC Online Corporate search of Oxford performed by Mr. Porteous on October 15, 1998, revealed M. Oughton was the only surviving director identified with the company. In short, when M. Oughton entered the mortgage with Peoples after October 13, 1998, he was the only individual qualified to be the director of Oxford and he was the only surviving individual disclosed as a member or registered shareholder and director of Oxford, upon a public search of corporate documents.
- [41] As mentioned earlier, although M. Oughton assigned himself into bankruptcy in December 1997, this court granted him an absolute discharge on October 13, 1998.
- [42] Shortly thereafter, the defendant's solicitor did the necessary searches to ensure that M. Oughton, now a discharged bankrupt, had the corporate capacity to act on behalf of Oxford. Searches of the Corporate Registry and the Land Titles Office indicated that M. Oughton was the sole director and the only person who could enter the mortgage transaction on Oxford's behalf.
- [43] On October 20, 1998, M. Oughton executed the Officer's Certificate and passed corporate resolutions approving the mortgage and authorizing him to execute the mortgage. That is, the Officer's Certificate and the resolutions were signed one week after M. Oughton's bankruptcy status was discharged, and the corresponding limitation on his capacity to be a

director was removed. On that same day, M. Oughton executed the mortgage on behalf of Oxford. The mortgage was registered in the Land Title Office on October 30, 1998, on which date Peoples advanced the funds.

- [44] M. Oughton, and he alone, took steps on behalf of Oxford to constitute himself as sole director of Oxford, to approve the mortgage, and to authorize the execution of the mortgage. In relation to his appointment as sole director of Oxford, Article 58 states: "Until otherwise determined by a general meeting, the number of Directors shall not be less than two ". However, Article 38 states: "Directors may, whenever they think fit, convene an extraordinary general meeting . . .". M. Oughton, performing the "functions of a director" (Company Act, subs.1(1) "director") and as the only member or registered shareholder of Oxford (Article 61), in fact, may have convened an extraordinary general meeting in October 1998, at which he appointed himself sole director.
- [45] Nonetheless, M. Oughton was the only individual entitled to exercise the voting powers associated with membership and, therefore, conduct business on behalf of Oxford. Article 53 requires that a voting member be a registered shareholder:
53. No member shall be entitled to vote at any general meeting unless . . . he has been registered as the holder of the shares in respect of which he proposes to vote.
- [46] In relation to the quorum necessary to conduct business at a general meeting, ss.141 and 144 of the Company Act sanction a quorum of one if a company has only one member, despite the quorum requirements set out in a company's articles:
141. One member of a company, if the company has a quorum of one, may constitute a meeting of the company.
144. The quorum for the transaction of business at a general meeting of a company is 2 persons, unless
- (b) the company has only one member, in which case the quorum is one person, and any provision of the articles inconsistent with that quorum, to the extent of that inconsistency, has no force or effect.
- [47] The necessary quorum to conduct business was satisfied in this case, as M. Oughton was the only member or registered shareholder of Oxford.
- [48] In the unique circumstances present in October 1998, it was technically legal for M. Oughton, and he alone, to take steps on behalf of Oxford to constitute himself as sole director, approve the mortgage, and grant actual authority to obtain the mortgage. M. Oughton was a director of Oxford when the mortgage transaction with Peoples was executed in October 1998.

[49] The plaintiff asserts that Peoples, through Mr. Porteous, bears responsibility for M. Oughton's ability to gain the capacity to become a director of Oxford. In written submissions, Oxford asserted the following:

The evidence discloses that Peoples Trust was not an innocent bystander, but rather was an agent of Marc Oughton responsible for creating the conditions that gave rise to the fraudulent mortgage against Oxford Holdings.

Peoples Trust Company not only ignored evidence that fraud was being perpetrated against Oxford Holdings Ltd. by Marc Oughton, but was complicit in the perpetration of such fraud by having its solicitors prepare for signature by Marc Oughton a Certified Copy of Resolutions of the Directors of Oxford Holdings Ltd. and an Officer's Certificate authorizing the mortgage.

[50] I find that it was the inaction of J. Oughton or Nita Ruzicka on his behalf to ensure that appropriate steps were taken prior to October 1998 to preclude M. Oughton from having actual authority to transact business on behalf of Oxford that enabled M. Oughton to have and assert his status as a director. I find that they had notice that M. Oughton was prepared to act on the actual authority which he had or could have upon being discharged from bankruptcy.

[51] Since M. Oughton was the director of Oxford at all relevant times during the mortgage transaction, he had actual authority via the Articles and corporate resolutions to bind Oxford. The mortgage entered into by M. Oughton on behalf of Oxford in favour of Peoples in October 1998 is valid and enforceable against Oxford.

Ostensible or Apparent Authority

[52] The requirements for ostensible authority are set out in *Freeman & Lockyer (A Firm) v. Buckhurst Park Properties (Mangal) Ltd.*, [1964] 2 Q.B. 480. These are:

- 1) A representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the other contracting party;
- 2) Such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
- 3) The contracting party was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
- 4) Under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

[53] On the facts, I find each of the four requirements is satisfied.

- [54] I do not intend to deal with the other alternative arguments presented to support the defendant's position on the basis of the facts and findings ruled upon to find that M. Oughton had actual authority. I find that if he did not have actual authority he had ostensible or apparent authority.
- [55] Ostensible or apparent authority is a legal concept which sets up an estoppel, which prevents a company from relying on its agent's lack of actual authority to transact business.
- [56] The plaintiff's action is dismissed.

Conduct of Sale

- [57] The issue of whether the court should order a sale and Conduct of Sale of the properties is not properly before this court. That and all other related matters are properly to be dealt with in any foreclosure proceedings.

Costs

- [58] The defendant seeks Special Costs of this action and of an aborted summary trial hearing which led to this action. The primary basis for the claim to Special Costs is that this action is "in effect" a foreclosure action or an action challenging an Order Nisi. In my view, there is no basis for an award of Special Costs on the ground that such an award would be appropriate pursuant to the mortgage contract or in foreclosure proceedings. This action was one for a declaration that the mortgage in question was invalid or unenforceable. There is no evidentiary basis for converting it into foreclosure proceedings.
- [59] The second ground for an order for Special Costs is on the basis that the plaintiff alleged fraud against the defendant and negligence against the third party. At the opening of trial, I asked counsel for the plaintiff if, in fact, it was alleging fraud or any impropriety on the part of the defendant in granting the mortgage. The plaintiff made the following submissions:

Peoples Trust Company not only ignored evidence that fraud was being perpetrated against Oxford Holdings Ltd. by Marc Oughton, but was complicit in the perpetration of such fraud by having its solicitors prepare for signature by Marc Oughton a Certified Copy of Resolutions of the Directors of Oxford Holdings Ltd. and an Officer's Certificate authorizing the mortgage. . . .

...

The thrust of such remarks was not an allegation that Peoples Trust knowingly or intentionally participated in any effort by Marc Oughton to defraud Oxford Holdings Ltd. The evidence does not suggest that Peoples Trust Company was involved in any conspiracy to defraud the company, but rather, it is submitted, was complicit in unknowingly making it possible for Marc Oughton to achieve that goal. To the extent that Peoples Trust acted improperly, it is submitted, it did so without fully appreciating the effects its improper actions were having on Oxford Holdings Ltd. directly, and on those who have an interest in Oxford Holdings Ltd. indirectly.

[60] In my view, the plaintiff did allege elements of fraud against the defendant. It also alleged negligence by the defendant's solicitor. In such a case, that is, where fraud is alleged and not proven, Special Costs may be awarded. Here, it is unclear whether outright fraud was alleged at all. In *Knight's Mineral Exploration & Co. v. Corcoran & Co. Ltd.* (1994), 24 C.P.C. (3d) 230 (B.C.S.C.) at pp. 234, 240-41, the issue of the award of Special Costs in relation to unproven fraud was discussed. The court stated that unproved allegations of fraud will not by themselves attract a Special Costs order, unless they were made maliciously or without foundation.

[61] Here, while in my view, the allegations of complicity in fraud had little merit, they were not without foundation. I would exercise my discretion, in this case, in all its circumstances, and award the defendants costs of this proceeding throughout, including the R. 18A trial on Scale 3.

"M.M. Koenigsberg, J."

The Honourable Madam Justice M.M. Koenigsberg

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